Petroliam Nasional Bhd (Petronas) v Kerajaan Negeri Sarawak

FEDERAL COURT (PUTRAJAYA) — APPLICATION NO BKA-7–06 OF 2018 (W)
AHMAD MAAROP CJ (MALAYA)
22 JUNE 2018

Constitutional Law — Federal Constitution — Articles 4(3), (4) and 128(1)(a) — Applicant applied for leave of Federal Court judge to petition Federal Court to grant declaratory reliefs against respondent — None of the declaratory reliefs sought to declare any law made by either Parliament or State Legislature as invalid — Whether application therefore did not fall within ambit of art 4(3) and (4) or within the exclusive original jurisdiction of the Federal Court — Whether consequently the question of obtaining leave of a Federal Court judge under art 4(4) did not arise

Pursuant to art 4(4) of the Federal Constitution, the applicant sought leave of a Federal Court judge to petition the Federal Court to grant declaratory reliefs against the respondent under arts 4(3) and 128(1)(a) of the Federal Constitution. The declarations the applicant sought were: (a) that by virtue of art 74(1) read with Item 8(j), List I, Ninth Schedule of the Federal Constitution, Parliament had exclusive legislative competence to enact laws pertaining to the exploration, exploitation, winning and obtaining of petroleum throughout Malaysia, whether onshore or offshore ('upstream activity'); (b) that the Petroleum Development Act 1974 ('the PDA') was duly enacted by Parliament and by virtue of s 7 thereof and regs 3 and 5 of the Petroleum Regulations 1974 and the order dated 28 November 1980 made under s 7A of the PDA, the chairman and chief executive of the applicant had exclusive regulatory authority over upstream activity; and (c) that the Sarawak Oil Mining Ordinance 1958 was impliedly repealed by the PDA.

Held, dismissing the leave application:

(1) The declaratory reliefs sought by the applicant did not come within the ambit of art 4(3) and 4(4) of the Federal Constitution as the applicant did not specifically ask for any declaration that a certain law was invalid on the ground the legislature which made that law had no legislative power to make it. As the declaratory reliefs sought by the applicant were not within the exclusive original jurisdiction of the Federal Court, but within the original jurisdiction of the High Court, the question of obtaining leave under art 4(4) of the Federal Constitution did not arise (see paras 6–7).

(2) Articles 4(3), 4(4) and 128(1)(a) of the Federal Constitution applied only where the validity of a law was challenged on the ground that it 'makes provision with respect to a matter with respect to which Parliament, or, as the case may be, the Legislature of the State has no power to make laws'. Whoever brought the proceedings under art 128(1)(a) must specifically ask for a declaration that the law impugned was invalid on that ground (see paras 3–4).

[Bahasa Malaysia summary

Menurut perkara 4(4) Perlembagaan Persekutuan, pemohon telah memohon kebenaran hakim Mahkamah Persekutuan untuk petisyen Mahkamah Persekutuan memberikan relif-relif deklarasi terhadap responden di bawah perkara 4(3) dan 128(1)(a) Perlembagaan Persekutuan. Deklarasi-deklarasi yang dipohon adalah: (a) bahawa menurut perkara 74(1) dibaca bersama Item 8(j), Senarai I, Jadual Kesembilan Perlembagaan Persekutuan, Parlimen mempunyai kecekapan perundangan untuk menggubal undang-undang berkaitan eksplorasi, eksploitasi, mendapatkan dan memperoleh petroleum di Malaysia, sama ada di pantai atau di luar pesisir pantai ('aktiviti huluan'); (b) bahawa Akta Pembangunan Petroleum 1974 ('APP') yang telahpun digubal oleh Parlimen dan menurut s 7 Akta tersebut dan peraturan-peraturan 3 dan 5 Peraturan-Peraturan Petroleum 1974 dan perintah bertarikh 28 November 1980 yang dibuat di bawah s 7A APP, pengerusi dan ketua eksekutif pemohon mempunyai kuasa perundangan eksklusif ke atas aktiviti huluan; dan (c) Ordinan Perlombongan Minyak Sarawak 1958 yang secara tersirat telah dimansuhkan oleh APP.

Diputuskan, menolak permohonan kebenaran:

(1) Relif-relif deklarasi yang dipohon oleh pemohon tidak terjatuh dalam skop perkara 4(3) dan 4(4) Perlembagaan Persekutuan kerana pemohon tidak secara spesifik memohon untuk apa-apa deklarasi bahawa undang-undang tertentu adalah tidak sah atas alasan perundangan yang menggubal undang-undang tersebut tidak mempunyai kuasa perundangan untuk menggubalnya. Oleh kerana relif-relif deklarasi yang dipohon oleh pemohon bukan dalam bidang kuasa asal eksklusif Mahkamah Persekutuan, tetapi dalam bidang kuasa asal Mahkamah Tinggi, persoalan memperoleh kebenaran di bawah perkara 4(4) Perlembagaan Persekutuan tidak timbul (lihat perenggan 6–7).

(2) Perkara 4(3), 4(4) dan 128(1)(a) Perlembagaan Persekutuan terpakai hanya di mana kesahan suatu undang-undang dicabar atas alasan bahawa ia 'makes provision with respect to a matter with respect to which Parliament, or, as the case may be, the Legislature of the State has no power to make laws'. Sesiapa yang memulakan prosiding di bawah perkara 128(1)(a) perlu secara spesifik dipohon untuk suatu deklarasi

A bahawa undang-undang yang dipersoalkan adalah tidak sah atas alasan tersebut (lihat perenggan 3–4).]

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)

B *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417; [2018] 4 CLJ 1, FC (refd)

Legislation referred to

C Federal Constitution arts 4, 4(3), (4), 74(1), 128, 128(1), (1)(a), Ninth Schedule, List I, Item 8(j)
Oil Mining Ordinance 1958 (Cap 85)
Petroleum Development Act 1974 ss 7, 7A
Petroleum Regulations 1974 regs 3, 5

D *Malik Imtiaz Sarwar (Surendra Ananth and Khoo Suk Chyi) (Malik Imtiaz Sarwar) for the applicant.*
Talat Mahmood Abdul Rashid (JC Fong, Saferi bin Ali and Mohd Adzrul Adzlan with him) (Sarawak State Attorney-General's Chambers) for the respondent.

E *Zaleha Rose Datuk Hj Pandin (Dayangku Fazidah Hatun bt Pg Bagul, Rafidah bt Maqbool Rahman and Shamsul Bolhassan with her) for watching brief.*

Ahmad Maarop CJ (Malaya):

F **[1]** Article 4 of the Federal Constitution provides:

4 Supreme law of the Federation.

(1) ...

(2) ...

G (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for *a declaration that the law is invalid on* that ground or —

H (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

I (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled

to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[2] Article 128 of the Federal Constitution provides:

128 Jurisdiction of Federal Court.

(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction —

(a) any question whether a law made by Parliament or by the Legislature of a State *is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws*; and

(b) disputes on any other question between States or between the Federation and any State.

[3] Articles 4(3), 4(4) and 128(1)(a) apply only where the validity of a law is challenged on the ground that it 'makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws' (see *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417; [2018] 4 CLJ 1).

[4] Clause (3) of art 4 provides that the validity of any law made by Parliament or by a State Legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant Legislature has no power to make law, except in three types of proceedings as follows:

(a) *in proceedings for a declaration that the law is invalid on that ground*; or

(b) if the law was made by Parliament, in proceedings between the federation and one or more states; or

(c) if the law was made by a State Legislature, in proceedings between the federation and that state.

It will be noted that proceedings of types (b) and (c) are brought by government, and there is no need for any one to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant Legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against government or by government against an individual, *but whoever brings*

the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Clause (4) of art 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the federation is entitled to be a party to such proceedings, and so is any state that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Clause (1) of art 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State Legislature is invalid on the ground that it relates to a matter with respect to which the relevant Legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in the land (see *Gin Poh*; *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112).

[5] In encl 1, the applicant prayed that it be given leave to commence proceedings against the respondent pursuant to art 4(4) of the Federal Constitution in the Federal Court in the exercise of its original jurisdiction under arts 4(3) and 128(1)(a) of the Federal Constitution by way of a petition for declaratory relief to the following effect:

1.1 a declaration that by virtue of art 74(1) read with Item 8(j), List I, Ninth Schedule, Federal Constitution, Parliament has exclusive legislative competence to enact laws pertaining to the exploration, exploitation, winning and obtaining of petroleum throughout Malaysia, be it onshore or offshore ('upstream activity');

1.2 consequentially:

(a) a declaration that the Petroleum Development Act 1974 ('the PDA') was duly enacted by Parliament and that by virtue of s 7 of the PDA, and regs 3 and 5 of the Petroleum Regulations 1974, and the order made under s 7A of the PDA dated 28 November 1980, the chairman and chief executive of the applicant have exclusive regulatory authority over upstream activity; and

(b) a declaration that the Sarawak Oil Mining Ordinance 1958 was impliedly repealed by the PDA;

2. the applicant is to commence said proceedings within 14 days from the date of the order herein;

3. costs of and incidental to this application be costs in the cause; and

4. further and/or other orders this honourable courts deems fit and just.

[6] It is clear that in the encl 1, the applicant does not specifically ask for declaration that certain law is invalid on the ground that the Legislature which made that law had no legislative power to make the law. In prayer 1.1, the applicant sought a declaration that Parliament has exclusive legislative competence to enact laws pertaining to the exploration, exploitation, winning and obtaining of petroleum throughout Malaysia, be it onshore or offshore, and that in prayer 1.2(a), declaration that the PDA was duly enacted. Indeed, the respondent did not dispute the entitlement of Parliament to enact the PDA. In prayer 1.2(b), the applicant does not seek a declaration that the Sarawak Oil Mining Ordinance 1958 was invalid on the ground that the legislature had no competency to legislate that law. What was prayed for was a declaration that the Ordinance was impliedly repealed by the PDA.

[7] In my view, the declaratory reliefs sought by the applicant do not come within the ambit of art 4(3) and 4(4) of the Federal Constitution. Hence, the declaratory reliefs sought by the applicant are not within the exclusive original jurisdiction of the Federal Court. The declaratory reliefs sought are within the original jurisdiction of the High Court. Thus, the question of leave under art 4(4) of the Federal Constitution does not arise.

[8] In the result, the application in encl 1 is dismissed.

The leave application dismissed.

Reported by Ashok Kumar